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No. 02-1624

In The
Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT

DAVID W. GORDON, Superintendent,
Petitioners,

v.

MICHAEL A. NEWDOW,
Respondent.

On Writ of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF HISTORIANS AND LAW SCHOLARS IN SUPPORT OF RESPONDENT

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici are legal and religious historians and law scholars who have studied, taught and written in the area of constitutional and religious history and the First Amendment in colleges and law schools across America. *Amici* file this brief in support of the Respondent in order to elucidate the Framers' disdain for all types of religious tests, oaths and pledges. Our names and institutional affiliations (listed for identification purposes only) are contained in Appendix A.

INTRODUCTION AND SUMMARY OF ARGUMENT

The policy of Petitioner Elk Grove Unified School District (Elk Grove) of having schoolchildren recite the Pledge of Allegiance – taking an oath, in effect – forces not only non-monotheists and atheists to choose between expressing love for country or expressing belief in God, but also other citizens who, because of religious scruples, may object to invoking God in such a manner. *See, e.g., Matthew* 5:34: "Swear not at all." Such a policy would have been opposed by the Framers of the Constitution, who generally viewed oath-taking as an inherently religious expression and were familiar with royal abuses of religious test oaths. Based on their intimate experience with oaths and pledges, the Framers sought to end, or at least no longer require, an obligation between religion and the (few)

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[1] This brief is filed with the consent of the parties. No counsel for either party to this matter authored this brief in whole or in part and no person or entity, other than *amici curiae* or its counsel, made a monetary contribution to the preparation or submission of this brief. *Amici* wish to acknowledge Matthew Cloud for his contributions to this brief.

loyalty requirements that the new federal government imposed. This is evidenced by Article VI, clause 3, of the Constitution, with its prohibition that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States" and its simultaneous requirement that all government officials of the United States be bound by "Oath or Affirmation." The debates on the ratification of these provisions are instructive in understanding the Framers' conception of the relationship between oath-taking and religion, and its relationship to the 'under God' clause in the Pledge of Allegiance.

ARGUMENT

The Founders of the Federal and State Governments Viewed Religious Oaths and Pledges With Great Disfavor.

A. The Framers Were Intimately Familiar with the Coercive Effect of Oaths and Religious Tests.

The Framers of the United States Constitution would have opposed a religiously-based national oath or affirmation sworn by citizens. On one level, the inhabitants of the newly-formed United States considered themselves first as citizens of their respective states who would only secondarily give allegiance to the federal government.[2] More significantly, however, Americans from all regions and stations considered oath-taking distasteful and "smak[ing] of royalism."[3] Apparently, several of the nation's founders viewed *any* oath as an "advertently religious expression."[4] Oliver Wolcott, a member of the Connecticut ratifying convention, argued against the inclusion of a specific religious pledge in the federal Constitution on the ground that an oath generally constitutes "a direct appeal to that

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[2] *See* Harold M. Hyman, *To Try Men's Souls: Loyalty Tests in American History* 84 (1959) (describing how the early states were "jealous in their loyalty-oath prerogatives.").

[3] Richard H. Schneider, *Stars & Stripes Forever: The History, Stories, and Memories of Our American Flag* 86 (2003).

[4] James E. Pfander, *So Help Me God: Religion and Presidential Oath-Taking*, 16 Const. Commentary 549 (1999); *see also* Sanford Levinson, *Constitutional Faith* 99-100 (1988).

God who is the avenger of perjury. Such an appeal to him is a full acknowledgment of his being and providence."[5] This universal objection to that form of coerced affirmation was "well known to the [F]ramers of the Bill of Rights."[6] As such, the Founders viewed oaths and pledges as "serious matters,"[7] not to be imposed lightly.

It is not an overstatement that the British penchant for oaths and affirmations was a leading catalyst in the founding of the British-American colonies. As this Court observed in *Torcaso v. Watkins,* "it was largely to escape religious test oaths and declarations that a great many of the early colonists left Europe and came here hoping to worship in their own way."[8] King Henry VIII instituted a test oath in the 1530s as a means of enforcing the Act of Succession and identifying and

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[5] 2 *The Debates of the Several State Conventions on the Adoption of the Federal Constitution* 202 (Jonathan Elliot ed., rev. 2d ed. 1941) (1836) [hereinafter *Elliot's Debates*].

[6] *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943). Justice Robert Jackson noted for the majority in *Barnette:*

> Early Christians were frequently persecuted for the refusal to participate in ceremonies before the statue of the emperor or other symbol of imperial authority. The story of William Tell's sentence to shoot an apple off his son's head for refusal to salute a bailiff's hat is an ancient one. The Quakers, William Penn included, suffered punishment rather than uncover their heads in deference to any civil authority.

Id. at 633 n.13 (citations omitted).

[7] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion,* 103 Harv. L. Rev. 1410, 1475 (1990).

[8] *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961).

eliminating religious and political enemies. In addition to Sir Thomas More, some fifty of the King's subjects lost their heads for refusing to take the oath.[9] Henry VIII subsequently instituted four loyalty oaths, a practice that his successors perpetuated, with the British love affair with religious test and loyalty oaths coming to an end only in the nineteenth century through the Parliamentary Oaths Act of 1868.[10]

Even though many early colonialists were dissenters to the British established order, once ensconced in the new world they quickly replicated the practices of the mother country.[11] In 1629, George Calvert, scouting a location for his new colony, was forced from Virginia after its leaders sought to require him to take an oath of allegiance and supremacy which, as a Catholic, he was unable to take.[12] Similarly, in 1634 the New England Puritan leaders empowered local governments to require citizens to take a loyalty oath pledging "by the great and dreadful Name of the Everliving God" their "true and faithfull[ness]" to the commonwealth, including their fealty to "the wholesome Laws and Orders made and established by the

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[9] Brian Burrell, *The Words We Live By: The Creeds, Mottoes, and Pledges That Have Shaped America* 53-55 (1997).

[10] *Id.* at 55; Hyman, *supra* note 2, at 1-4.

[11] *Torcaso*, 367 U.S. at 490 (noting that many who fled Great Britain to escape the coercion of oaths instituted similar requirements on dissenters and nonconformists).

[12] Hyman, *supra* note 2, at 19-20; Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 34 (1986).

same."[13] Ironically, according to Professor Harold Hyman, the first item printed on the first printing press in the English-speaking colonies was this loyalty oath.[14] All of the other colonies followed this pattern, imposing religious test and loyalty oaths, not solely for public office holding, but as marks of citizenship as well.

Despite their ubiquity, loyalty oaths and pledges were highly contentious matters during the colonial era, not solely for Quakers and Mennonites who refused to swear based on religious scruples, but also because colonists identified oaths with British oppression and as being inconsistent with emerging notions of freedom of conscience.[15] Distrust of oath-taking flowed in part from "the religiously inspired perception that an oath might unfairly demand a promise that would send an oath-taker to eternal damnation," and also partly reflected "a growing recognition that oath-taking might invade rights of conscience of the increasingly [diverse] populace of the country."[16] James Madison reported the remarks of future Supreme Court justice James Wilson during the Constitutional Convention as stating "he was never fond of oaths, considering them as a left handed security only. A good Government did not need them, and a bad one could not or ought not to be

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[13] Hyman, *supra* note 2, at 15; Levinson, *supra* note 4, at 99-100.

[14] Hyman, *supra* note 2, at 15.

[15] Burrell, *supra* note 9, at 61.

[16] *Id.*; Pfander, *supra* note 4, at 549.

supported."[17] And Benjamin Franklin was reputed to have remarked, "I have never regarded [oaths] otherwise than the last recourse of liars."[18]

As a result, in those rare instances where the Founders instituted loyalty oath requirements for officeholding, they considered them to be indispensable to the establishment and maintenance of the new political and legal institutions.[19] Oaths were such "serious matters," that the Philadelphia Framers included in the Constitution only two such requirements, spelling out the Presidential oath of office in Article II, while requiring in Article VI that all federal and state political and judicial officials take an "Oath or Affirmation to support this Constitution."[20] Even then, the Presidential oath conspicuously omits the words, "So Help Me God," which were prevalent in "virtually every oath then current in the courts of law."[21] Also,

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[17] James Madison, *Notes of Debates in the Federal Convention of 1787* 345 (1840).

[18] Burrell, *supra* note 9, at 61.

[19] Levinson, *supra* note 4, at 93.

[20] McConnell, *supra* note 7, at 1475; Levinson, *supra* note 4, at 91-92; Burrell, *supra* note 9, at 55-56. Professor Levinson argues that the importance the Framers ascribed to oath-taking is demonstrated by Chief Justice John Marshall's opinion in *Marbury v. Madison*, 5 U.S. 137 (1803), where the Court justified judicial review of congressional statutes in part on the obligation of federal judges to swear an oath to uphold the Constitution. Levinson, *supra* note 4, at 92.

[21] Pfander, *supra* note 4, at 550. As Respondent addresses in his merits brief at 27, the First Congress also rejected a proposed reference to God in the language of the oath of office. *See* 1 Annals of Cong. 102 (1789).

with its provision for an oath or *affirmation,* "the presidential promise in the Constitution reflects a concern for rights of conscience that a simple oath requirement would have ignored."[22]

In contrast to the Founders' view of loyalty oaths as necessary evils,[23] they were firmly opposed to *religious* test oaths. To the Founders, *religious* tests and oaths were qualitatively different and considered more troubling than their secular counterparts. As Judge Arlin Adams has written, "[p]erhaps the most powerful weapon for maintaining [a religious] establishment was the religious test oath, which proved effective in detecting dissenters and compelling allegiance to orthodoxy."[24] According to another scholar:

> Religious tests had long been a favored instrument for preserving the political power of established churches and denying equal political opportunity to adherents of other creeds. . . . For centuries a formal attestation of religious belief or affiliation had been a prerequisite for holding public office and exercising civic prerogatives. . . . Th[ey]

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[22] Pfander, *supra* note 4, at 549 n.2 (emphasis added).

[23] Noah Webster believed that "[t]he time will come (and the day may be near!) when all test laws, oaths of allegiances, abjuration, and partial exclusions from civil offices will be proscribed from this land of freedom. . . . They originated in savage ignorance, and they are the instruments of slavery." Noah Webster, *On Test Oaths, Oaths of Allegiance, & Partial Exclusions from Office, in* 4 Philip B. Kurland & Ralph Lerner, *The Founders' Constitution* 636 (1987).

[24] Arlin M. Adams & Charles J. Emmerich, *A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses* 55 (1990).

> were viewed as vital instruments of social control and unity, symbolically reminding the colonists of their subjugation, obligations, and allegiance to the crown.[25]

The Founders' disdain for religious tests and oaths was based on first-hand experience. Religious tests and oaths were commonplace in pre-Revolutionary America. All of the colonies, even religiously permissive Pennsylvania and religiously indifferent Rhode Island, imposed affirmations of a belief in God or Jesus upon office holders, voters, and court participants, with most colonies requiring something closer to the Westminster Confession.[26] Initially, most colonies refused to exempt religious dissenters such as Quakers, Mennonites, and Dunkers from the oath requirements; only gradually (and grudgingly) did colonial legislatures allow dissenters to affirm rather than swear allegiances.[27] For example, in 1722 the New Jersey legislature enacted a Protestant oath of allegiance for all citizens, excluding Catholics but exempting Quakers, with those refusing to take the oath being "deemed 'Popish

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[25] Daniel L. Dreisbach, *The Constitution's Forgotten Religion Clause: Reflections on the Article VI Religious Test Ban,* 38 J. Church & State 261, 262-63 (1996).

[26] *See generally The Federal and State Constitutions, Colonial Charters and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* (Francis Newton Thorpe ed., 1909) [hereinafter Thorpe]; *see also* Curry, *supra* note 12, at 50, 64, 73, 75, 78-81; Anson Phelps Stokes & Leo Pfeffer, *Church and State in the United States* 37 (1964).

[27] *See* Curry, *supra* note 12, at 60 (noting that the 1704 North Carolina legislature disenfranchised Quakers by requiring an oath of allegiance instituted by Queen Anne).

Recusant' convicts, subject to all the penal laws of England."[28] Even by the end of the Revolutionary War, twelve of the fourteen states imposed some type of religious test for public officeholding, with many simply carrying over their colonial practices.[29] Six states required public officeholders to be Protestants;[30] two others required officeholders to affirm a belief in God and the divine inspiration of Christian scripture;[31] while Massachusetts required adherence to the Christian faith and Maryland, based on its Catholic legacy, only a belief in God.[32] All states continued to require religiously based oaths for participating in court proceedings and legal transactions. These various legal restrictions made many rights of citizenship turn on an individual's willingness to publicly proclaim a belief in God and, in turn, affected the political and social standing of

[28] *Id.* at 73.

[29] Dreisbach, *supra* note 25, at 265-67. Only the New York and Virginia constitutions declined to mandate religious qualifications for public office holders. *Id.* While prohibiting a specific religious test, the New York legislature in 1788 imposed a requirement that all elected officeholders renounce allegiance to all foreign powers, "ecclesiastical as well as civil," potentially excluding Catholics. Thorpe, *supra* note 26, at 5:2636-38; Curry, *supra* note 12, at 162.

[30] Georgia, New Hampshire, New Jersey, North Carolina, South Carolina, and Vermont. *See* Dreisbach, *supra* note 25, at 265-67; Stokes & Pfeffer, *supra* note 26, at 37.

[31] Pennsylvania and Delaware. North Carolina, South Carolina and Vermont imposed this additional requirement. *See* Dreisbach, *supra* note 25, at 265-67.

[32] *See* Dreisbach, *supra* note 25, at 265-67. Connecticut and Rhode Island did not draft constitutions until the nineteenth century, carrying over their colonial religious tests: Connecticut (Christian); Rhode Island (belief in God).

religious dissenters.

Entering into the Constitutional Convention of 1787, therefore, the Framers were intimately familiar with the legacy and oppressive affect of religious tests and oaths. The decision to enact and ratify Article VI, clause 3, must be considered in light of this history.

B. The Enactment and Ratification of Article VI, Clause 3, Evinces the Framers' Intent to Do Away with All Forms of Religious Tests and Oaths.

When compared to the longstanding practice of religious test oaths, the decision of the Constitution Framers to prohibit religious tests for federal officeholding is highly significant and represents a dramatic departure from the status quo. Without question, the Framers were keenly aware they were breaking with precedent and consciously rejected the common practice.[33]

Governor Charles Pinckney of South Carolina proposed what would become Article VI, clause 3, moving that "No religious test or qualification shall ever be annexed to any oath office under the authority of the United States." Earlier, in May 1787, Pinckney had addressed the delegates, stating that "the prevention of Religious Tests, as qualifications to Offices or

[33] *See* Gerald V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine that Has Gone of Itself*, 37 Case W. Res. L. Rev. 674, 680 (1987) (Article VI, clause 3 "was a significant departure from existing legal practice and popular beliefs."); *accord* McConnell, *supra* note 7, at 1474 (describing the decision to ban religious tests as a "dramatic departure from established British practice and those of a majority of states.").

Trusts of Emolument . . . [is] a provision the world will expect from you, in the establishment of a System founded on Republican Principles, and in an age so liberal and enlightened as the present."[34] His proposal was later adopted with apparently little debate or opposition, with Madison's notes recording only North Carolina as opposing the measure with Maryland being divided.[35] Indeed, that the Constitution reflects "a policy of ending the religious nature of oath-[taking] comes through clearly in the rejection of a proposed amendment that would have altered the general oath requirement in Article VI[36] to proclaim it, in essence, a religious test for office."[37]

The alacrity with which the test ban was considered and enacted raised the ire of Maryland delegate Luther Martin who, on reporting back to the Maryland legislature, stated:

[34] *See* 3 *The Records of the Federal Convention of 1787* 122 (Max Farrand ed., 1937) [hereinafter Farrand].

[35] The only recorded comment being that of Connecticut's Roger Sherman who stated that he "thought it [the ban] unnecessary, the prevailing liberality being a sufficient security agnst. such tests." 5 *Elliot's Debates*, *supra* note 5, at 498. Gouverneur Morris of Pennsylvania and General Charles Cotesworth Pinckney of South Carolina (the former Pinckney's second cousin) both voiced approval in unreported speeches. *Id.*; 2 Farrand, *supra* note 35, at 468.

[36] U.S. Const. art. VI, cl. 3: "The Senators and representatives before mentioned, and the Members of the Several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

[37] Pfander, *supra* note 4, at 550-51. The amendment would have inserted the word "other" before "religious" in Article VI and "would thus have converted the oath into a religious test." *Id.* at 551 n.6.

> The part of the system, which provides that no religious test shall ever be required as a qualification to any office or public trust under the United States was adopted by a great majority of the Convention, and without much debate. However, there were some members so unfashionable as to think that a belief in the existence of a Deity, and of a state of future rewards and punishments, would be some security for the good conduct of our rulers, and that, in a Christian country, it would be at least decent to hold out some distinction between the professors of Christianity and downright infidelity or paganism.[38]

But Pinckney's proposal was not "so unfashionable," as it reflected a growing sentiment that religious oaths were inconsistent with notions of religious liberty, rights of conscience and equal citizenry. In fact, a second, if not co-equal, aim of Thomas Jefferson's *Statute for Establishing Religious Freedom* (1786), championed by James Madison in his *Memorial and Remonstrance* in 1785, had been to abolish Virginia's religious test for officeholding:

> that our civil rights have no dependence on our religious opinions . . . and therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his

[38] 1 *Elliot's Debates*, *supra* note 5, 385-86.

-fellow citizens he has a natural right.[39]

The religious test ban, therefore, was not some novel invention but drew on the same principles of liberty and equality that were informing the Framers in the creation of the nascent democratic governments.[40]

Once the Philadelphia Convention concluded, the Framers and their supporters in the state ratifying conventions committed themselves to rooting out a practice that, according to future Supreme Court Chief Justice Oliver Ellsworth, was "the parent of hypocrisy, and the offspring of error and the spirit of persecution."[41] The ban on religious tests in the federal Constitution ran into opposition in a handful of state ratifying conventions. Many anti-federalists, particularly in Connecticut, Massachusetts, and North Carolina, raised concerns that without a religious test, "Pagans, Deists and Mahometans might obtain offices among us."[42] They were countered by a chorus of voices, including those of future justices Ellsworth and

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[39] *Church and State in American History* 73 (John F. Wilson & Donald L. Drakeman eds., 1987). The operative section of the statute states: "all men shall be free to profess, and by argument maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities." *Id.* at 74.

[40] *See* Isaac Kramnick & R. Laurence Moore, *The Godless Constitution* 37, 143 (1996).

[41] Oliver Ellsworth, *A Landholder VII* (published in the Connecticut Courant, Dec. 17, 1787), *in The Debate on the Constitution* 1:525 (Bernard Bailyn ed., 1993) [hereinafter Bailyn].

[42] 4 *Elliot's Debates*, *supra* note 5, at 191-92 (comments of Henry Abbot).

James Iredell, who tied the purpose of the test ban to enhancing religious liberty and rights of conscience.[43] "[H]ow is it possible to exclude any sect of men [from officeholding]," asked Iredell, "without taking away that principle of religious freedom which we ourselves so warmly contend for? This is the foundation on which persecution has been raised in every part of the world."[44] The proponents of religious test ban prevailed, and Art. VI, clause 3, has become an enduring symbol of freedom of conscience and equality of belief in this nation.[45]

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[43] Ellsworth (Connecticut): "[T]he sole purpose and effect of [the test ban] is to exclude persecution, and to secure to you the important right of religious liberty." Bailyn, *supra* note 41, at 1:522.

Iredell (North Carolina): "I consider the clause under consideration as one of the strongest proofs that could be adduced, that it was the intention of those who formed this system to establish a general religious liberty in America." 4 *Elliot's Debates*, *supra* note 5, 193.

Rev. Shute (Massachusetts): "To establish a religious test as a qualification for offices . . . would be attended with injurious consequences to some individuals and with no advantage to the whole." 2 *id.* at 118.

[44] 4 *Elliot's Debates*, *supra* note 5, at 194.

[45] Professors Bradley and Dreisbach argue that neither proponents nor opponents of Art. VI, clause 3, viewed religious tests as inconsistent with religious liberty or rights of conscience, based on the proponents' reliance on pragmatic arguments and their support for religious tests at the state level. Rather, Bradley and Dreisbach view the ratification debate as centering on issues of federalism and the preservation of state autonomy over religious matters. *See* Bradley, *supra* note 33, at 689-90; Dreisbach, *supra* note 25, at 274-79, 286. However, the fact that proponents used all arguments at their disposal does not negate the sincerity their claims about the inconsistency of religious oaths with notions of religious liberty and freedom of conscience. Also, as discussed below, most states quickly followed the federal example by abolishing their own religious tests, indicating the growing antipathy toward such oaths.

Article VI, clause 3, also instituted a liberalizing trend in the states.[46] Several states – South Carolina (1790), Delaware (1792), Vermont (1793), Georgia (1798) – quickly abolished or modified their own religious tests in response to the sentiments expressed in the ratifying conventions.[47] Other states followed suit in the early nineteenth century.[48] Also, those state constitutions adopted after 1787 followed the federal model,[49] such that by the time of *Torcaso v. Watkins*, only a handful of state constitutions contained test clauses, with several of them having already been found unenforceable.[50]

To be sure, most state courts continued to uphold religiously based oath requirements for testifying in court, serving on juries, or participating in other legal transactions.[51] But even within this bastion of legal tradition, nineteenth

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[46] *See* Adams & Emmerich, *supra* note 24, at 16.

[47] *See* Thorpe, *supra* note 26, at 2:568; 3:1690; 6:3258; Curry, *supra* note 12, at 162.

[48] Connecticut (1818); Maryland (1826); Rhode Island (1842); New Jersey (1844) Thorpe, *supra* note 26, at 2:544; *see also* Chester James Antieau et al., *Religion Under the State Constitutions* 102-04 (1965).

[49] Kentucky (1792); Tennessee (1796); Ohio (1802); Indiana (1816); Mississippi (1817); Illinois (1818); Alabama (1819); Maine (1819); Michigan (1835); Iowa (1846); Wisconsin (1848). *See* Antieau, *supra* note 48, at 102-04.

[50] *See id.*

[51] *See Curtiss v. Strong*, 4 Day 51 (Conn. 1809) (requiring that witnesses be able to affirm a belief in God and a future state of rewards and punishments after death); *State v. Cooper*, 2 Tenn. 96 (1807) (same).

century state courts began to lessen the exclusionary requirements of swearing a belief in God and the future state of punishments and rewards as a prerequisite for participating in legal proceedings.[52] Several states abolished entirely all religious prerequisites to oath-taking,[53] with an increasing number of courts agreeing with the Iowa Supreme Court that "[e]very human being of sufficient capacity to understand the obligation of an oath is a competent witness in this State."[54] The

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[52] *See Brock v. Milligan*, 10 Ohio 121, 125-26 (1840) ("We think, then, . . . that whoever believes in the moral influence and control of an overruling Providence in this life, and that an oath is binding on his conscience, is competent to testify. . . . And it is worthy of consideration, whether the great ends of justice, the object of all law, would not be promoted, even if this requisition were swept away, and no inquiry permitted as to what concerns the duties of the creature to his Creator only, in order to determine the competency of witnesses.") (emphases omitted); *see also Arnold v. Arnold's Estate*, 13 Vt. 362, 365, 367-68 (1841) ("Almost all sober, and especially religious men, have . . . sincerely regretted the frequency of oaths; and not a few men of that same class have even questioned the necessity of resorting to the sanction of an oath, in any department of civil administration. . . . Indeed no man could look at the form of an oath, and not feel that it was regarded as a religious ceremony. . . . It is obvious that a sincere deist, a mahometan, or a pagan of any name, if he believe in the existence of God . . . may feel the sanction of an oath as binding upon his conscience, as the most devout christian. And all that is now required is that the oath should bind the conscience of the witness.").

[53] *See Perry v. Commonwealth*, 44 Va. (3 Gratt.) 632 (1846); *People v. Jenness*, 5 Mich. 305 (1858); *Stanbro v. Hopkins*, 28 Barb. 265 (N.Y. App. Div. 1858); *Commonwealth v. Burke*, 82 Mass. 33 (1860); *Fuller v. Fuller*, 17 Cal. 605 (1861); *City of Shreveport v. Levy*, 26 La. Ann. 671 (1874); *Bush v. Commonwealth*, 80 Ky. 244 (1882); *Londener v. Lichtenheim*, 11 Mo. App. 385 (1882); *Randolph v. Landwerlen*, 92 Ind. 34 (1883); *Hroneck v. People*, 24 N.E. 861 (Ill. 1890).

[54] *State v. Elliot*, 45 Iowa 486, 489 (1877).

trend was as obvious as was the consensus it announced: that government should not assign benefits of citizenship based on an individual's willingness to affirm or pledge a belief in God.

Accordingly, when this Court in *Torcaso* struck down Maryland s modest requirement that officeholders declare a belief in God, it did so based on rights of freedom of conscience and religion.[55] In so doing, it equated the declaration to a religious test.[56] But equally important, *Torcaso* is consistent with the Court's more recent admonitions that the government is prohibited from "making adherence to a religion relevant in any way to a person's standing in the political community."[57]

C. The Pledge of Allegiance, Through its Reference to a "Nation, under God," Contravenes the Principles that Underlie Article VI, Clause 3.

This Court has recognized the similarities between religious tests, loyalty oaths, pledges, and affirmations and has treated them as having near or equivalent effect. In *Girouard v. United States*, the Court considered the exclusionary effect

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[55] *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) ("We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person to profess a belief or disbelief in any religion.") (quotations omitted).

[56] *Id.* at 489-90.

[57] *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring); *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000) (reaffirming that the government should avoid sending messages to religious nonadherents "that they are outsiders, and not full members of the political community.").

of a naturalization oath of allegiance on a pacifist Seventh-day Adventist to be identical to a religious test.[58] "It is hard to believe that one need forsake his religious scruples to become a citizen but not to sit in the high councils of state."[59] Also, in *West Virginia Board of Education v. Barnette*, the Court equated the Pledge of Allegiance with a loyalty oath.[60] The "compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind," Justice Jackson wrote for the Court.[61] And in his *Barnette* concurrence, Justice Black described the Pledge as "a form of a test oath, and the test oath has always been abhorrent in the United States."[62]

Two factors in particular direct that the Pledge of Allegiance, as used in this context, contravenes rights of conscience and religious liberty as are enshrined in Article VI,

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[58] 328 U.S. 61 (1946).

[59] *Id.* at 66.

[60] *Barnette*, 319 U.S. at 632-33.

[61] *Id.* at 633.

[62] *Id.* at 644 (Black, J., concurring). *Accord id.* at 645 (Murphy, J., concurring) (noting the purpose of the Pledge of Allegiance as "to inculcate sentiments of loyalty and patriotism"). *But see id.* at 663-64 (Frankfurter, J., dissenting) ("The flag salute exercise has no kinship whatever to the oath tests so odious in history. For the oath test was one of the instruments for suppressing heretical beliefs. Saluting the flag suppresses no belief nor curbs it.").

Significantly, the author of the Pledge of Allegiance, Francis M. Bellamy, favored the description of "pledge" rather than "oath" only as a matter of semantics. Bellamy feared that the title, "Oath of Allegiance," would engender resentment by Southerners still familiar with the "Ironclad Test Oath" imposed during the Civil War. *See* John W. Baer, *The Pledge of Allegiance: A Centennial History, 1892-1992* 9 (1992).

clause 3, and the First Amendment to the Constitution: 1. Congress's 1954 amendment adding the phrase "under God" to the Pledge of Allegiance; and 2. the subtle coercive environment of the public schools.

First, the federal and state governments have over the years imposed limited loyalty oath requirements on public officeholding and employment and simple oath requirements for participating in judicial proceedings or engaging in legal transactions.[63] Even then, governmental attempts at expanding loyalty oath requirements to the general citizenry have frequently met with resistence by this Court, based on free speech and due process concerns.[64] Significantly, absent a short

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[63] Congress has also instituted oaths for induction into the military, naturalization and for passport applications. Burrell, *supra* note 9, at 55-56.

[64] *See, e.g., Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154 (1971); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278 (1961); *Speiser v. Randall*, 357 U.S. 513 (1958); *First Unitarian Church v. County of Los Angeles*, 357 U.S. 545 (1958); *Weiman v. Updegraff*, 344 U.S. 183 (1952).

In *Cole v. Richardson*, 405 U.S. 676 (1972), while upholding a Massachusetts requirement that public employees swear an oath to uphold and defend the federal and state constitutions, the Court reaffirmed earlier holdings imposing restrictions on oath requirements: "that neither the federal nor state government may condition employment on taking oaths that impinge on rights guaranteed by the First and Fourteenth Amendments, . . . [nor condition employment] on an oath that one has not engaged, or will not engage, in protected speech activities . . .[or not engage in] associational activities within constitutional protection. . . . An underlying, seldom articulated concern running throughout these cases is that the oaths . . . put the government into the censorial business of investigating, scrutinizing, interpreting, and then penalizing or approving the political viewpoints and past activities of individuals." *Id.* at 680-81.

period during the Civil War,[65] the nation has resisted instituting citizen loyalty oaths, with the possible exception being the Pledge of Allegiance.[66]

Congress' 1954 amendment to the 1942 law adopting the Pledge of Allegiance had the effect of transforming the Pledge from a simple loyalty oath to an impermissible religious test oath.[67] Prior to 1954, to recite the Pledge was "to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, [and] justice."[68] Since 1954, however, to recite the Pledge is also to swear allegiance to belief in monotheism. It cannot be gainsaid that the overriding purpose if the 1954 amendment was to incorporate a religious affirmation into the Pledge – to acknowledge that "our Nation was founded on a fundamental belief in God."[69] The former version of the Pledge was permissible under *Barnette,* only

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[65] *See generally* Hyman, *supra* note 2, at 139-266.

[66] *See* Pub. L. No. 623, ch. 435, § 7, 56 Stat. 380 (1942) (codified at 36 U.S.C. § 172).

[67] *See Barnette*, 319 U.S. at 632-33 (equating the Pledge of Allegiance with a loyalty oath). As noted above, two of the justices in *Barnette* equated the unamended version of the Pledge with at religious test oath, based on its effect on the religious scruples of the Jehovah's Witnesses litigants. *See id.* at 644 (Black, J., concurring) (describing the Pledge of Allegiance as "a form of a test oath, and the test oath has always been abhorrent in the United States.").

[68] *See* App. at 11a.

[69] *See* H.R. Rep. No. 83-1693; 1954 U.S.C.C.A.N. 2339, 2340; *see also* Steven G. Gey, *"Under God," The Pledge of Allegiance, and Other Constitutional Trivia,* 81 N.C. L. Rev. 1865, 1873-80 (2003).

insofar as it was not compulsory so as not to infringe on rights of conscience or the free exercise of religion; the latter version, on the other hand, as the Framers' experience demonstrates, and as the Ninth Circuit recognized, is not permissible.[70] The Pledge now requires a speaker to make an affirmation of religious belief – it "requires the individual to communicate by word and sign his acceptance of the [religious] ideas it thus bespeaks."[71]

Also, unlike the loyalty requirements in the Constitution, there is no equivalent substitute, no "affirmation" alternative, for taking the Pledge.[72] The explicit mention of God in the Pledge inherently infringes on an individual's freedom of conscience.[73] It places a citizen who would otherwise willingly participate in reciting the Pledge in the untenable position of choosing between expressing patriotism and expressing religious belief.

Second, even though the Elk Grove policy does not

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[70] *See* App. at 17a ("[W]e do not believe that the Constitution prohibits compulsory patriotism as in *Barnette*, but permits compulsory religion as in this case.").

[71] *Barnette*, 319 U.S. at 633.

[72] *Cf. State v. Floyd*, 577 S.E.2d 215 (S.C. 2003) (holding that trial judge erred in refusing to permit jury candidate from taking affirmation as alternative to religious oath requirement containing the phrase, "So help me God").

[73] *See Barnette*, 319 U.S. at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

mandate participation in the Pledge, its recitation in the public school environment places impermissible coercive pressure on students to participate in an exercise with religious content or protest.[74] It is uncontested that Congress, in amending the 1942 act, intended that the Pledge, with its "under God" clause, be recited by public schoolchildren.[75] In so doing, Congress hoped that this daily recitation by schoolchildren would lead them to "deny the atheistic and materialistic concepts of communism" and embrace "the moral directions of the Creator."[76] The religious nature of this affirmation is unmistakable.

The Court has consistently recognized the uniquely coercive environment of the public school setting and has zealously protected the rights of students to be free from even subtle religious indoctrination.[77] Also, within the public school

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[74] *See Lee v. Weisman*, 505 U.S. 577, 593 (1992).

[75] "[T]he children of our land, in daily recitation of the pledge in school, will be daily impressed with a true understanding of our way of life and its origins. As they grow and advance in this understanding, they will assume the responsibilities of self-government equipped to carry on the traditions that have been given to us. Fortify our youth in their allegiance to the flag by their declaration to 'one Nation, under God.'" H.R. Rep. No. 83-1693; 1954 U.S.C.C.A.N. at 2341.

[76] *Id.*

[77] *See Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) ("Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary."); *see also Lee*, 505 U.S. at 593 (striking down prayer given by an invited religious official at a high school graduation); *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) (striking down amended state statute endorsing "voluntary" prayers for one minute at the

context, this Court has never required evidence of direct compulsion for the Establishment Clause to have affect. For instance, in the school prayer cases, *Engel v. Vitale*[78] and *Abington Township v. Schempp*,[79] the Court struck down prayer recital in public schools even though neither of the prayers at issue was required to be recited by students. In *Engel,* the New York Court of Appeals had upheld the STATE-endorsed Regents' prayer "so long as the schools did not compel any pupil to join in the prayer over his or her parents' objection."[80] Yet the Court struck down the practice, noting that the Establishment Clause "does not depend upon any showing of direct governmental compulsion."[81] Likewise in *Schempp,* "the students and parents [were] advised that the student may absent himself from the classroom or, should he elect to remain, not participate in the exercises."[82] This religious exercise, too, was invalidated. The Court's more recent cases are to the same effect. Neither the graduation prayer in *Lee v. Weisman,* nor the football game prayer in *Santa Fe Independent School District v. Doe,* involved mandatory participation in the

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beginning of each schoolday); *Stone v. Graham,* 449 U.S. 39, 42 (1980) (striking down state statute requiring the posting of the Ten Commandments in public school classrooms).

[78] 370 U.S. 421 (1962).

[79] 374 U.S. 203 (1963).

[80] *Engel*, 370 U.S. at 423.

[81] *Id.* at 430.

[82] *Schempp*, 374 U.S. at 207.

religious exercises at issue.[83]

Here, Elk Grove's policy requires its elementary school teachers to lead "willing"students in the recitation of the Pledge. Although in theory that may permit "unwilling" students to opt-out of the exercise, as applied the policy is unquestionably frustrated amidst the "subtle coercive pressure" of the elementary school context.[84] Even assuming that Elk Grove's teachers and administrators remind their students each day of their freedom not to participate in reciting the Pledge before the start of classes, there can be no doubt that while watching classmates rise to recite "one Nation, under God," a child would feel less than fully able to exercise that right or, at a minimum, that her standing in the school community turned on her willingness to recite the Pledge.[85] A child who would refuse to recite the Pledge on religious grounds risks being labeled irreligious as well as unpatriotic. This situation is fully analogous to the concerns that motivated the Framers in enacting Article VI, clause 3, and have informed this Court's school prayer holdings. As in *Lee,* "[f]inding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting. . . . [T]he State may not . . . place primary and secondary school

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[83] *Lee*, 505 U.S. at 592-93; *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 310-12 (2000).

[84] *Lee,* 505 U.S. at 592.

[85] *See, e.g., Allegheny County v. ACLU,* 492 U.S. 573, 673 (1989) (Kennedy, J., concurring part and dissenting in part) ("[I]t borders on sophistry to suggest that the reasonable atheist would not feel less than a full member of the political community every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false.") (quotations omitted).

children in this position."[86]

Therefore, the claim that because Elk Grove's policy does not, on its face, require unwilling students to recite the Pledge and that it comports with *Barnette* can be to no avail. The Ninth Circuit correctly understood this: "[U]nder *Lee*, non-compulsory participation is no basis for distinguishing *Barnette*."[87]

CONCLUSION

For the foregoing reasons, the judgment of the U.S. Court of Appeals for the Ninth Circuit should be affirmed.

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[86] *Lee*, 505 U.S. at 593.

[87] App. at 13a.

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